

Towards the Cliff

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For more than three centuries, Britain has taught the world how to do parliamentarianism. Not God's grace, not the command over an army, not the adoration of the masses will bestow upon a person the right and the power to rule – only a majority in parliament can do that, and nothing else. This basic principle of the British political system, so unsurpassably simple, transparent and efficient, this much-admired and much-imitated paradigm which has become universally known as the Westminster model – it seems to have come apart in its very place of origin. What has taken its place looks like a dreadful travesty in which neither the government has a majority nor the majority is able or willing to govern. While the regulatory framework of a substantial part of the British economy and the basis of two decades of peace in Northern Ireland are still heading towards a cliff, the oldest, most robust, most adaptable constitution in the world may have already fallen off it.

In the Westminster model, the government can do whatever it thinks is right, as long as it has the backing of the majority of MPs, while the risk of losing that majority keeps both sides acting responsibly. This formula (government<-[accountability/control]->parliament majority) combines a maximum of empowerment with a minimum of risk of damage. That's what makes it so strong.

In Westminster reality, however, things are going quite the other way around at the moment: a minimum of empowerment meets a maximum of damage risk. As the country races towards that proverbial cliff, the government points to the people and the parliament to the government and the people to the parliament, no one wants to be responsible for anything, everyone screams in panic: Stop! Stop! but nobody seems to be prepared to actually take it upon oneself to look out for the brake pedal, find it and step on it.

Second thoughts

Maybe that is because there is no brake? Brexit means Brexit, the people have decided, and politics must deliver – that's the line Prime Minister Theresa May has been pushing with the persistence of a cable drill for months, which is why many people for a long time tied their hopes to the so-called "People's Vote": to ask the people for a second time to see if they maybe have changed their minds after all the horror they have experienced since the first round. There would be probably no time to put this idea into practice any more now, but I have always found it rather problematic, anyhow. What would be the subject of the sentence "The people has changed its mind"? A people who makes up its mind does so in a concrete, legally ordered process, and exclusively so: without that, it doesn't make any sense to talk about a people as a political actor at all. Now, the 2016 procedure, in which the people decided for Brexit, has been concluded. A second referendum, even if it produced a different outcome than the first (which is by no means certain), would not

be an expression of the changed mind of the people, but contradictory information about what it wants.

Open referendum questions like the one on Brexit in 2016 are a treacherous business: Not only is the answer perilously vague and therefore likely to cause a lot more political strife than it settles. It's also very hard to move on from it. When the Irish were asked in 2009 whether they had changed their mind about rejecting the Lisbon Treaty, that question was about a concrete document, one that had changed significantly in Ireland's favour since the first referendum in 2008. The Irish did not want the first version, but they did want the second one, by a substantial margin – that adds up perfectly fine. The British, on the other hand, want Brexit – that has been determined in a constitutionally correct and binding way, close outcome and potentially changing minds notwithstanding. That's all we know and all we have. And while a politician more astute than Theresa May may or may not have found a way to interpret that will without driving the country over the edge of the cliff, Her Majesty's current Prime Minister apparently, as of this writing, hasn't.

Nevertheless, it's Theresa May who *could* actually change her mind. Under European law, the government, until the last moment, has the option to revoke the Brexit declaration under Article 50 TEU; the ECJ has expressly [stated](#) that the UK may do so unilaterally and without the participation of the EU. More than 4 million British subjects (as of Saturday noon) have signed a [petition](#) calling for exactly that. If that comes true, in the imagination of many [remainers](#) the country would finally wake up from a three-year nightmare, drenched in sweat but relieved to find that everything is pretty much fine and back to normal, the UK safely remaining in the EU, even keeping all its opt-outs, everybody happy, including the British public sobered and reformed by the experience of real-life Brexit...

Before the government could revoke the Art. 50 declaration, Parliament would presumably [have to pass another law](#). But that is mere theory as long as Theresa May chooses to turn to the people and pit it against Parliament, instead. "[I'm on your side](#)", she said, meaning: on "the People's" side against the MPs. Says the head of a government accountable to Parliament! Westminster, it seems, is indeed the last place one should go to study parliamentarism right now.

To revoke the Brexit declaration, Theresa May would have to transform herself into the insolvency executor of her own policy of the last three years. And there's no evidence that anyone else would or could organise a majority in Parliament in her place – especially not the one whose job that would actually be, namely the leader of Her Majesty's loyal opposition, Jeremy Corbyn.

Another, albeit somewhat extreme [scenario](#) goes like this: Parliament takes the matter into its own hands and enacts a law which, bypassing the government, instructs a third party to revoke the Brexit declaration in the name of Her Majesty. Parliament would thus have created a second and counter-government for the single purpose of Changing Our Mind. Not exactly elegant, this solution, but probably doable if a majority in Parliament so wished – and an even more drastic break with the Westminster model. "The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion of the executive

and legislative powers," [Walter Bagehot](#) wrote back in 1867. Parliament would, presumably under the leadership of its Speaker John Bercow who is already increasingly perceived as a political actor, detach itself completely from this fusion of powers and confront the government as an external, Bismarckian opponent. How utterly unbritish.

Powerful feelings

Bercow's decision this week to deny the government another "meaningful vote" in Parliament unless there is something substantially new to vote on has caused a huge scandal in the **UK** and greatly intensified the feeling of a big-time constitutional crisis. [JACK SIMSON CAIRD](#), however, defends the Speaker against the accusation that he is usurping the role of an oppositional actor against the government's policy: "In a constitutional system such as the UK, which largely depends on political institutions and norms to check the executive, it is entirely appropriate – indeed, desirable – that the Speaker identify, interpret and enforce such norms to defend the institutional interests of the House of Commons and basic values of parliamentary democracy".

[CHRISTINE LANDFRIED](#) calls on the EU not to be too complacent about the chaos in the **UK** and to show more willingness to compromise on the issue of the Northern Ireland backstop.

With the **European** elections in May, the European Parliament might indeed be taking a step closer to the Westminster model. [ALBERTO ALEMANN](#) notes the emergence of a European public sphere and real European parties that pave the way for a genuine European transnational democracy. These, like all elections in Europe, will be marked by resentment, fear, anger and disgust, powerful feelings whose destructive effect on liberal democracy should, according to [TOMASZ KONCEWICZ](#) and [LOGAN STROTHER](#), be explored more thoroughly.

The elections are European, but the electoral laws are national: and in **Hungary** this means that Fidesz can consolidate its dominance not only in the national but also in the European Parliament by means of tampering with the electoral system. [ZSOLT KÖRTVÉLYESI](#) describes how Fidesz has been broadening its voter base by extending citizenship to ethnic Hungarians abroad.

The European People's Party has shied away from expelling the Fidesz autocrats before the election and chose to only suspend its membership for the time being instead. [LANDO KIRCHMAIR](#) pleads not to rely too much on the judiciary or the party system when it comes to push back authoritarianism in **Poland and Hungary**, but to fight "fire with fire": the EU should launch information campaigns in both Polish and Hungarian.

The **German** Bundesrat wants to tackle the so-called "dark net" with criminal law measures. [MATTHIAS BÄCKER](#) and [SEBASTIAN GOLLNA](#) consider the planned criminal offence to be a failure and part of a worrying trend to extend criminal law into the field of crime prevention.

The **Bavarian** Constitutional Court couldn't detect any constitutional problem with the hijab ban on judges and prosecutors in the courtroom. For [HANS MICHAEL HEINIG](#), the finding of the Court is alright, in spite of some deficiencies in the reasoning, while for [AQILAH SANDHU](#) it is not.

In its recent *Arib* judgment, the European Court of Justice ruled that the reintroduction of border controls under Schengen law does imply that member states can treat **EU** internal borders as if they were external borders. [CONSTANTIN HRUSCHKA](#) analyses the ruling and notes that things such as the "fiction of non-entry" would clearly be contrary to EU law.

[ELENA-SIMINA TANASESCU](#) reports on the latest developments in the fight against corruption in **Romania** and the role of the Constitutional Court in this murky matter.

According to the Administrative Court of Appeals of Münster, **Germany** must not simply pretend that it is none of its business if the USA deploys drones contrary to international law from its Ramstein base on German soil. [MICHAEL BOTHE](#) defends the court against the accusation of being out of touch with political reality: "Out of touch is rather an attitude which acts as if everything were legally fine with the American drone program". For [HEIKO SAUER](#), on the other hand, the judgement from Münster does not go far enough: The court had missed the opportunity to clearly state that the US use of drones was contrary to international law.

[THOMAS WIERNY](#) thinks little of the plans of the German federal states to link the public broadcasting fee to an index and accuses the state prime ministers of dodging their responsibility.

Elsewhere

[ROSE SLOWE](#) concludes that it is not an unregulated Brexit, but the **United Kingdom's** stay in the EU that is the legally required default solution in the case of no-deal. [STEVE PEERS](#) summarises the legal consequences of the EU summit's decision to extend the Brexit deadline, and [ELEANOR SPAVENTA](#) explains why UK would have to hold European elections if it was still a member of the EU in May. [KENNETH ARMSTRONG](#) illuminates in a very compact way how the time trap continues to tick even after the extension of the withdrawal period. [MARKO MILANOVIC](#) calls the considerations of escaping the Northern Ireland backstop with reference to *Clausula Rebus Sic Stantibus* in Article 62 VCLT an "obvious, exam-failing non-starter". [DAMIEN CONNIL](#) examines what the formation of the new remainer "Independent Group" in the House of Commons entails in terms of parliamentary and constitutional law.

[PETER BARTLETT](#) points to a decision of the European Court of Human Rights in a **Portuguese** case concerning the right to life of suicidal psychiatric patients.

[MANON ALTWEGG-BOUSSAC](#) is concerned about freedom of expression in the face of anti-fake news legislation in **France**.

[MASSIMO FICHERA](#) examines the multiple constitutional difficulties of the populist government in **Italy**.

Three Polish civil and human rights organisations have created a [website](#) that keeps you up to date on the current state of the rule of law crisis in **Poland** – highly recommended!

[BERTA HERRERO](#) describes the background of the growing civil protests in **Serbia**.

[ALEX ANDRIONE-MOYLAN and JAN WOUTERS](#) investigate the renaissance of Helsinki committees in **Eastern Europe**.

[MIGUEL ÁNGEL PRESNO DE LINERA](#) explains what happens when the Catalan separatist leader Carles Puigdemont, a fugitive from **Spanish** justice, is elected to the European Parliament.

[ANDREW KOPPELMAN](#) adds a chapter to the "[Talking to Right-Wingers](#)" textbook about the plight of conservative students at liberal law schools in the **US**.

[KHEMTHONG TONSAKULRUNGRUANG](#) hopes that **Thailand** will be saved from authoritarianism in the upcoming parliamentary elections.

So much for this exceptionally eventful week. Next week we look forward to an online symposium on EU military integration organized by JELENA VON ACHENBACH. This will be exciting! We hope you'll enjoy that and much more on Verfassungsblog and wish you all the best,

Max Steinbeis

